ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
KAREN R. BAKER, JUDGE

DIVISION II

CA06-274

February 28, 2007

BENTON COUNTY WATER DISTRICT NO. 1
APPELLANT

v.

BENTON WASHINGTON REGIONAL PUBLIC WATER AUTHORITY
APPELLEE

AN APPEAL FROM BENTON COUNTY CIRCUIT COURT
[No. CIV 2003-637-1]

HONORABLE TOM KEITH
CIRCUIT JUDGE

REVERSED and REMANDED

Appellant Benton County Water District No. 1 (the "District") seeks reversal of a declaratory judgment rendered in favor of appellee Benton Washington Regional Water Authority (the "Authority") after a bench trial. The trial court found that the provisions of a water-purchase contract between the parties concerning the timing of rate increases were void and that the rate increases were justified. We reverse and remand.

The Authority supplies water to the District for resale to the District's customers. On June 18, 1996, the parties entered into a contract that replaced an identical contract entered into in 1993. The contract was a form water-purchase agreement supplied by a division of the United States Department of Agriculture (USDA) in its function of providing grants and loans for construction of water-delivery systems. The term of the contract was to be twenty

years from the initial delivery of water, which was on May 25, 1999. Pursuant to the terms of the contract, the Authority was to supply the District with potable, treated water, not to exceed twenty-five million gallons per month, at the following rates:

> a. $1.26 per thousand for the first 12 Million gallons, which amount shall also be the minimum rate per month.
>
> b. $1.26 cents [sic] per 1,000 gallons for water in excess of 12 Million gallons but less than 15 Million gallons.
>
> c. $1.15 cents [sic] per 1,000 gallons for water in excess of 15 Million gallons.

The contract further provided that the rates may be modified every three years to adjust for "demonstrable" increases in the cost of performance:

> [T]he provisions of this contract pertaining to the schedule of rates to be paid by the [District] for water delivered are subject to modification at the end of every three year period. Any increase or decrease in rates shall be based on a demonstrable increase or decrease in the cost of performance hereunder, but such costs shall not include increased capitalization of the [Authority's] system. Other provisions of this contract may be modified or altered by mutual agreement.

The first rate increase, to $1.36 per thousand gallons, was effective April 29, 2002. The Authority approved another rate increase, to $1.50 per thousand gallons, effective May 29, 2003. The District's representative voted against the 2003 increase. After the 2002 rate increase, the District paid the Authority under protest for the portion of the rate that exceeded the agreed rate in the contract.

On May 9, 2003, the District filed its complaint for declaratory and injunctive relief, seeking an order enjoining increases in rates and a refund of rates paid under protest directly

to the Authority and into the registry of the court.[1] The Authority answered, denying the material allegations of the complaint. On April 22, 2004, the Authority filed its counterclaim alleging mutual mistake and seeking reformation. The Authority alleged that the parties intended that rates should be subject to modification at any time to meet debt service and continued operation of the system.

At trial, the District argued that, under the terms of the contract, the Authority could not implement a second rate increase for the District until May 25, 2005, six years from the commencement of the contract. The District also argued that, although the Authority had a duty to demonstrate that the rate increase was justified, it did not attempt to demonstrate to the District, or the Authority's other customers, that the rate increase was based upon an increased cost of performance.

The Authority asserted that the restrictions on the rate increases in the contract violated the terms of its loan documents with third-party lenders and its bylaws. The Authority further asserted that the 2002 and 2003 rate increases were for increased costs of performance.

The trial court announced its decision from the bench, stating that, although the contract was clear and the three-year period was applicable, the Authority must have the ability to raise the funds necessary to meet both its long-term debts and its short-term debts

[1]At the time of trial, the District had paid $49,744.28 relating to the 2002 rate increase and $46,599.22 relating to the 2003 rate increase.

in order to operate the system.[2] The court also found that the matter of the rates charged did not have to be mutually agreed upon and was a decision solely for the Authority. The court further found that the only limit on rates was that any increase could not be used for the increased capitalization of the Authority's system and that the rate increase was not for the increased capitalization. Finally, the court found that, on May 25, 2002, the District was obligated to pay the increased rate of $1.36 per thousand gallons and that, because there was no new agreement between the parties, the rate increased to $1.50 per thousand on April 12, 2003.[3] The court clarified its finding by stating that the three-year period would start to run once the parties made a new agreement. The court ordered each party to bear its own costs and attorney's fees.

On December 2, 2005, the trial court entered an order in which it found that the first sentence of the rate-adjustment paragraph was void in that "three year period" conflicted with the bylaws of the Authority and with loan documents. Additionally, the court also held that the 2002 and 2003 rate increases are justified under the terms of the contract. On December 19, 2005, the District filed a timely notice of appeal and now raises two points for reversal.

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[2]We recognize that the trial court's ruling may have been based in part on public policy as expressed in Ar. Code .Ann. § 4-35-110 (Supp. 2005). Although the applicability of this statute was argued neither below nor on appeal, we attempted to certify this case to our supreme court due to the public policy implications. The Supreme Court declined certification; therefore, we do not discuss the applicability of Ark. Code Ann. § 4-35-110 (Supp. 2005) or any related public policy issues.

[3]There is no explanation for why these dates used by the trial court in it's ruling from the bench differ from the effective dates of the rate increases as shown by the resolution adopting the increases.

In bench trials, the standard of review on appeal is whether the judge's findings were clearly erroneous or clearly against the preponderance of the evidence. *Murphy v. City of West Memphis*, 352 Ark. 315, 101 S.W.3d 221 (2003). A finding is clearly erroneous when, although there is evidence to support it, the reviewing court, when considering all of the evidence, is left with a definite and firm conviction that a mistake has been committed. *Id*. This court views the evidence in a light most favorable to the appellee, resolving all inferences in favor of the appellee. *Arkansas Transit Homes, Inc. v. Aetna Life & Cas.*, 341 Ark. 317, 16 S.W.3d 545 (2000). Disputed facts and determinations of the credibility of witnesses are within the province of the fact finder. *Ford Motor Credit Co. v. Ellison*, 334 Ark. 357, 974 S.W.2d 464 (1998). However, a trial court's conclusion on a question of law is reviewed de novo and is given no deference on appeal. *Murphy*, *supra*.

In its first point on appeal, the District contends that the trial court erred when it determined that contract's provision limiting rate modifications to every three years was void. This point requires an interpretation of the parties' agreement.

The first rule of interpretation of a contract is to give the language employed the meaning that the parties intended, and the court must consider the sense and meanings of the words used by the parties as they are taken and understood in their plain, ordinary meaning. *First Nat'l Bank v. Griffin*, 310 Ark. 164, 832 S.W.2d 816 (1992). It is the duty of the court to construe a contract according to its unambiguous language without enlarging or extending its terms. *North v. Philliber*, 269 Ark. 403, 602 S.W.2d 643 (1980). In regard to the construction of an agreement's terms, the initial determination of the existence of an

ambiguity rests with the court. *Fryer v. Boyett*, 64 Ark. App. 7, 978 S.W.2d 304 (1998). When a contract is unambiguous, its construction is a question of law for the court. *Id*. A contract is unambiguous and its construction and legal effect are questions of law when its terms are not susceptible to more than one equally reasonable construction. *Id*.

Here, the trial court found that the agreement's language was clear — the schedule of rates paid by the District is subject to modification at the end of every three-year period. Other courts construing similar rate-modification provisions have held that they are unambiguous. *See Utilities Bd. of City of Tuskegee v. Town of Notasulga*, 530 So. 2d 228 (Ala. 1988) (three-year provision); *City of Strong v. Rural Water Dist. No. 1*, 636 P.2d 192 (Kan. App. 1981) (two-year provision); *Butler Cty. Bd. of Cmm'rs. v. City of Hamilton*, 763 N.E.2d 618 (Ohio App. 2001) (one-year provision). Where a contract is unambiguous, its construction is a question of law for the court, and the intent of the parties is not relevant. *Oliver v. Oliver*, 70 Ark. App. 403, 19 S.W.3d 630 (2000); *Kennedy v. Kennedy*, 53 Ark. App. 22, 918 S.W.2d 197 (1996). However, the trial court then failed to enforce the contract as written; instead, the trial court held in its written order that the three-year period was void because it conflicted with the Authority's bylaws and with loan documents with third parties. Therefore, the trial court was in error in finding that the agreement's provision regarding the frequency of rate modification to be void. We reverse and remand the case to the trial court to apply the three-year restriction on rate increases and for such other proceedings as are consistent with this opinion.

In light of our disposition of the District's first point, we pretermit discussion of its second point.

Reversed and Remanded.

GLADWIN and BIRD, JJ., agree.